

IN MEMORIAM: KARL LLEWELLYN

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I KNEW Karl Llewellyn during the last fifteen years of his life. During the first six of those years I was a member of the staff which he assembled and directed in the drafting of the Uniform Commercial Code.

During all the years of work on the Code no one ever questioned Karl's encyclopaedic knowledge of the broad areas of law encompassed in the Code. We quickly learned to appreciate the resourcefulness of his mind, his clarity in analysis, and his ingenuity in devising solutions to the apparently insoluble. Karl was a master at grasping, intuitively, the hidden areas of agreement which underlay the clash of argument and at constructing a synthesis which often brought an angry debate to harmonious conclusion. Himself a man of strong opinions, he showed himself astonishingly patient—even of stupidity—although his capacity for Christian charity could, on occasion, be tried to, and beyond, the breaking point. He had, more than any other man I have ever known, the ability to put aside his own preconceptions: there was no *parti pris*, no pride of authorship, no dogmatism. Nor was there in Karl's willingness to explore new approaches to long-familiar problems any trace of weakness or irresoluteness; his eagerness to listen, and to learn, proceeded from a sure confidence in his own strength.

Karl Llewellyn was, as we all must be, a man of his time. We are prisoners both of the world around us and of ourselves: living is mostly a matter of building the prison walls within which we are to be confined and we use whatever materials come to hand. Fifty years earlier, or fifty years later, we would be different from what we are. Karl, with respect to his professional career, was, then, a man of the period 1920-1960.

He came to the law at a time when a tradition—the great tradition of classical jurisprudence—was in the process of being destroyed. He became an enthusiastic demolisher and remained, throughout his life, instinctively opposed to system-building. His considerable contribution to the jurisprudence of this century was not in the elaboration of formal patterns, of logical constructs, of generalized theory. His work will, I believe, be remembered for its flashing insights, for the brilliance of its intuitions, for the powerful, untidy surge of life that carries it forward.

I do not know to what extent Karl would have accepted my characterization of his attitude toward systematic theory. There were moments and moods in which the building of systems attracted and exhilarated him. But there is manifest in his work a consistent, almost unconscious preference for the particular over the general. In the introduction of his casebook on Sales (1930) he wrote: "I do not conceive it to be a teacher's duty to let the true light

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shine." Light, surely, but the "true light" is quite another thing. In his great series of articles on the law of sales, which appeared during the 1930's, a recurrent theme is the need for "narrow issue" thinking, for abandoning, in the context of sales law, such "lump concepts" as that of title. A year or two ago Karl read over a short piece of mine on legal realism. His comment, I thought, illuminated both the nature of realism and the nature of his own thinking. "You go wrong," he said, "when you look at realism as a theory or a philosophy. It was neither. It was never meant to be either. What it was meant to be, and what it was, was a methodology."

I have perhaps overstated the destructive character of Karl's involvement with realism. It is easy enough to smash things. It is hard to destroy carefully, lovingly, precisely, only what needs to be destroyed, preserving what still has use. Karl's version of realism was affirmative, not negative, a labor of love and not of hate. He had a life-long love for the process and craft of judging, to which his last book bears eloquent witness. Appropriately, the title of that book repeats a phrase which we may take as a key to much of his work: *The Common Law Tradition*. Revolutionary as his early writings were thought to be, Karl abhorred abrupt departures, sudden breaks and the revealed certainty of novel illumination. He was a man of tradition, of continuity, of ordered growth and gradual change.

There may appear to be an element of paradox in my insistence on Karl's dislike of system-building, on his preference for the particular over the general, on his fascination with judge-made law. Over many years his energies were devoted to the drafting of statutes; this aspect of his work culminated in the fifteen-year ordeal of drafting the Commercial Code. Make no mistake: this Code was Llewellyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from beginning to end he inspired, directed and controlled it. The statute-man, one assumes, must be, as I have said Karl was not, a system-builder, a generalizer, a despiser of the fumbling approximations of case law.

It was, I believe, Karl's non-systematic, particularizing cast of mind and his case-law orientation which gave to the statutes he drafted, and particularly to the Code, their profound originality. He was a remarkable draftsman and took a never-failing interest in even the minutiae of the trade. His instinct appeared to be to draft in a loose, open-ended style; his preferred solutions turned on questions of fact (reasonableness, good faith, usage of trade) rather than on rules of law. He had clearly in mind the idea of a case-law Code: one that would furnish guide-lines for a fresh start, would accommodate itself to changing circumstances, would not so much contain the law as free it for a new growth. The tastes of the practicing lawyers who advised the draftsmen were, in most cases, opposed to the flexible ideas of the Chief Reporter: they preferred, they insisted on, a tightly-drawn statute, precise, detailed and rigid. Among the many drafts of the Code which appeared, beginning in 1946, the early drafts were in many ways closer to Karl's conception of the Code than were the final drafts. In the concluding phase of the drafting, concessions

were inevitably made to what might be called political pressures; I do not mean to suggest that these pressures were in any sense evil or malevolent. I have come to feel that Karl saw more clearly than his critics and that the Code as he initially conceived it might better have served the purposes of the next fifty years. Yet Karl never lost sight of the fact that his job was to produce, not the best Code which could ideally be put together by a band of scholarly angels, but the best Code which stood a chance of passage in the imperfect world of men. He cheerfully gave ground when he had to: the final product was indubitably his and will remain an enduring tribute to his memory.

We live in a world of yea-saying, a world in which whoever is not with us must be against us, a world in which whatever is not white must be black, a world in which, it may be, the true light shines. Karl Llewellyn was not a man for such a world. He was a man more given to questions than to answers, more taken with seeking than with finding. He loved beauty in all its many forms; he delighted in the infinite variety of things and people and ideas. He was not perfect; he was merely, in his many-faceted humanity, a strong and humble man, a man of great kindness and charity, a man of understanding, a man of wit—a man who came closer than most of us do, or will, to wisdom.